E COP

Supreme Court, U.S.
FILED
SEP 19 197
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,
Petitioners,

v.

MAURICE OSSER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
313 South Juniper Street
Philadelphia, Pennsylvania 19107
Attorneys for Petitioners

Of Counsel:
DONALD A. GIANNELLA
GREGORY M. HARVEY

August 28, 1972

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. Petitioners' case presents substantial constitutional questions which require the convening of a three-judge court since petitioners' complaint alleges that they and other pretrial detainees in Philadelphia County are absolutely denied the right to vote by the Commonwealth of Pennsylvania	12
II. Petitioners' case constitutes a case or controversy under Article III of the Constitution	28
CONCLUSION	33

TABLE OF AUTHORITIES

Cases:

Anderson v. Martin, 375 U.S. 399 (1964)	23
Anderson v. Nosser, 438 F.2d 183 (1971) *modified*, 456 F.2d 835 (5th Cir. 1972)	20
Bailey v. Patterson, 369 U.S. 31 (1962)	12, 13
Boddie v. Connecticut, 401 U.S. 371 (1971)	17
Bolling v. Sharpe, 347 U.S. 497 (1954)	22
Brown v. Board of Education, 347 U.S. 483 (1954)	22
Brown v. Board of Education, 349 U.S. 294 (1955)	11, 31

Bullock v. Carter, 405 U.S. 134 (1972) 19, 20, 23
California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) 13
Carrington v. Rash, 380 U.S. 89 (1965) 15
Cipriano v. City of Houma, 395 U.S. 701 (1969) 19, 20
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 19, 20
Conklin v. Hancock, 334 F. Supp. 1119 (D. N.H. 1971) 20
Davis v. Lindsay, 321 F. Supp. 1134 (S.D. N.Y. 1970) 20
Douglas v. California, 372 U.S. 353 (1963) 15, 22, 23
Dunn v. Blumstein, 405 U.S. 330 (1972) 19
Edwards v. California, 314 U.S. 160 (1941) 22
Evans v. Cornman, 398 U.S. 419 (1970) 19
Ex Parte Poresky, 290 U.S. 30 (1933) 13
Fair v. Osser, Civil Action No. 71-2212, Eastern District of Pennsylvania, September 27, 1971 32
Federal Trade Commission v. Dean Foods Co., 384 U.S. 597 (1966) 17
Goldberg v. Kelly, 397 U.S. 254 (1970) 3
Gomillion v. Lightfoot, 364 U.S. 339 (1960) ... 9, 10, 17, 22, 25
Goosby v. Osser, 452 F.2d 39 (3d Cir. 1971) 8, 13, 28
Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970) 23, 24
Griffin v. Illinois, 351 U.S. 12 (1956) 10, 23, 24
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 23
Guinn v. United States, 238 U.S. 347 (1915) 25
Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) 20
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 15, 16, 18, 23

Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) 23

Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967) *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 23

Hunter v. Erickson, 393 U.S. 385 (1969) 22

Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971) 23

Jones v. Wittenberg, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971) *aff'd sub nom.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) 20

Korematsu v. United States, 323 U.S. 214 (1944) 22

Kramer v. Union Free School District, 395 U.S. 621 (1969) 19, 20

Lane v. Wilson, 307 U.S. 268 (1939) 10, 25

Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933) 9, 13, 17

Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) 31

Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) 23

Louisiana v. United States, 380 U.S. 145 (1965) 11, 31

McDonald v. Board of Elections, 394 U.S. 802 (1969) ... *passim*

McLaughlin v. Florida, 379 U.S. 184 (1964) 15, 22

Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972) 20

Myers v. Anderson, 238 U.S. 368 (1915) 25

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) 23

Palmigiano v. Travisono, 317 F. Supp. 776 (D. R.I. 1970) 20

Re Metropolitan Railway Receivership, 208 U.S. 90 (1908) 11, 29, 30

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Serrano v. Priest, 96 Cal. Rptr. 601, 487 P.2d 1241 (1970) 23

Tyler v. Ciccone, 299 F. Supp. 685 (W.D. Mo. 1969) 21

Walling v. Helmerich and Payne, Inc., 323 U.S. 37 (1944) 30

Wayne County Jail Inmates v. Wayne County Board, No. 173217, Wayne County Circuit Court, May 18, 1971 21

Williams v. Illinois, 399 U.S. 235 (1970) 10, 23, 24

Constitutional and Statutory Provisions:

Civil Rights Act, 42 U.S.C. §1983 .....2, 6

Permanent Registration Act of March 30, 1937, Pennsylvania P.L. 115, §§ 1-46 as amended, 25 Purdon's Statutes § 621-1 *et seq.* (1963) and Permanent Registration Act of April 29, 1937, Pennsylvania P.L. 487, §1, *et seq.*, as amended, Act of May 31, 1955, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §951-2 *et seq.* (1963) 2, 3

Illinois Rev. Stat. c. 46, §19-1 to 19-3 ..... *passim*

Pennsylvania Constitution, Article I, Section 5 2

Pennsylvania Constitution, Article VII, Section 4 2

Pennsylvania Election Code, Act of June 3, 1937, Pennsylvania P.L. 1333, Article I, §102 as amended by Act of August 13, 1963, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §2602(z)(x)(y)(z-1) and (z-3) (Supp. 1972); Act of June 3, 1937, Pennsylvania P.L. 1333, Article XII, §1210, 25 Purdon's Statutes §3050 (a) and (d) (1963) ..... *passim*

United States Code, Title 28, §1254(1) 2

United States Code, Title 28, §2281 .....2, 12, 13

United States Code, Title 28, §2284(1) 2

United States Constitution, Article I, Section 2 2

United States Constitution, Article III, Section 2 . 2, 7, 11, 28, 31

United States Constitution, Amendment I 2

United States Constitution, Amendment VIII 2

United States Constitution, Amendment XIV 2, 5

United States Constitution, Amendment XV 2, 5, 10, 25

United States Constitution, Amendment XXIV 2

Voting Rights Act of 1965, 42 U.S.C. §1971 (a)(1) and (2)(A) 2, 5, 6, 25

Miscellaneous:

Coons, Clune & Sugerman, Educational Opportunity, A Workable Constitutional Test for State Financial Structures, 57 Calif. L. Rev. 305 (1969) 24

Goldberg, Equality and Governmental Action, 39 N.Y.U.L. Rev. 205 (1964) 24

Michelman, The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) 22, 24

Note, Supreme Court, 1968 Term, 83 Harv. L. Rev. 7 (1969) 26

Official Records of the Statistical Unit of the Pennsylvania Department of Justice, Sept. 30, 1971 3

Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969) 24

United States Department of Justice, 1970 National Jail Census 4

APPENDIX TO BRIEF

INDEX

United States Constitution 1a
United States Code 3a
Pennsylvania Constitution 5a
Pennsylvania Election Laws 5a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,

Petitioners,

v.

MAURICE OSSER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 88) is reported at 452 F.2d 39 (3d Cir. 1971). The opinion of Circuit Judge Arlin Adams, dissenting from the denial by the Court of Appeals of rehearing *en banc* (A. 94), is reported at 452 F.2d at 41. No written opinion was rendered by the District Court for the Eastern District of Pennsylvania, but a transcript of the oral opinion of the District Court given from the Bench is set out in the Appendix (A. 81).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 26, 1971. A timely petition for rehearing *en banc* was denied on December 17, 1971, three of seven judges dissenting. The petition for a writ of certiorari was filed on March 10, 1972, and was granted on June 26, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' case presents substantial constitutional issues which require the convening of a three-judge court where petitioners' complaint alleges that they and other unconvicted pretrial detainees in Philadelphia County are absolutely denied the right to vote by the Commonwealth of Pennsylvania.

2. Whether petitioners' case constitutes a case or controversy within the meaning of Article III of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 2, Article III, Section 2 and Amendments 1, 8, 14, 15, and 24.

United States Code, Title 28 §§2281, 2284(1), Title 42 §1971(a)(1) and (2)(A), Title 42 §1983.

Pennsylvania Constitution, Article I, Section 5, Article VII, Section 4.

Permanent Registration Act of March 30, 1937, Pennsylvania P.L. 115, §§ 1-46, as amended, 25 Purdon's

Statutes §623-1 *et seq.* (1963) and Act of April 29, 1937, Pennsylvania P.L. 487, §1, *et seq.*, as amended Act of May 31, 1955, Pennsylvania P.L. 707, §1, *et seq.*, 25 Purdon's Statutes §951-2 *et seq.* (1963).

Pennsylvania Election Code, Act of June 3, 1937, Pennsylvania P.L. 1333, Article I, §102, as amended by the Act of August 13, 1963, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §2602(w)(x)(y)(z-1) and (z-3) (Supp. 1972); Act of June 3, 1937, Pennsylvania P.L. 1333, Article XII, §1210, 25 Purdon's Statutes §3050(a) and (d) (1963).

The text of the above provisions is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Petitioners represent a class of untried pretrial detainees who possess all the voter qualifications required of a citizen of Pennsylvania and who are incarcerated in Philadelphia County prisons either because they cannot afford bail or because they are charged with non-bailable offenses. (Complaint, ¶s23, 27, and 44, A. 16, 17, and 20).[1] The class consists of approximately 2,000 persons, over 90 percent of whom are "non-white",[2] and almost

[1] At the time the complaint was filed, twelve individuals were named as representatives of petitioners' class. Subsequently, several of these named class representatives lost their status as class members, either because they have been released on bail, transferred to institutions outside of Philadelphia County, or been discharged, acquitted, or convicted. This does not, of course, render the case moot. See *McDonald v. Board of Elections*, 394 U.S. 802, 803 n. 1 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 256 n. 2 (1970).

[2] Official Records of the Statistical Unit of the Pennsylvania Department of Justice, September 30, 1971.

all of whom are indigent.[3] Petitioners desire to vote in all future federal, state and local elections and fall into two sub-classes: (a) those who were registered to vote prior to their present incarceration, and (b) those who are not registered to vote. (Complaint, ¶23, A. 16).

Petitioners allege in their complaint that the Commonwealth of Pennsylvania is absolutely denying them the right to vote because (1) their incarceration and the laws of Pennsylvania prevent them from registering and voting in person, (2) the laws of Pennsylvania prohibit them from registering by absentee means and expressly prohibit them from voting by absentee ballot because they are "confined in a penal institution", and (3) the election officials of the Commonwealth of Pennsylvania, acting pursuant to and under state law, will neither permit them to leave prison to register and vote nor bring registrars and voting machines to the prisons. (Complaint, ¶ s 30-34, 40, 47-56, A. 17-21).

Petitioners further allege that this absolute denial of the right to register and vote is unconstitutional for the following reasons, among others:

1. Petitioners are denied equal protection of the law because those who can afford bail are not denied the right to vote and, therefore, petitioners' right to vote is

---

[3]Some petitioners, for example, cannot afford to pay $100 for a $1,000 bail bond. (Complaint, ¶7, A. 12-13).

There are approximately 83,000 pretrial detainees incarcerated in the United States, 4,000 of whom are in Pennsylvania. (U.S. Dept. of Justice, 1970 National Jail Census, pp. 1 and 10). These men and women are often incarcerated for substantial periods of time while awaiting trial, some for as many as several years. One of the named class representatives, for example, was incarcerated awaiting his trial for almost 4 years (Complaint, ¶13, A. 14), and another for over one year (Complaint, ¶12, A. 14).

directly tied to their indigency and their inability to afford bail is a *de facto* poll tax. (Complaint, ¶61(a), A. 22).

2. Petitioners are denied equal protection of the law because those who are convicted of a crime but who are free on probation or parole are not denied the right to vote. (Complaint, ¶41 and Exhibit C, ¶58, A. 19, 21, and 61).

3. Petitioners are denied due process of law because they are unconvicted pretrial detainees who must be presumed innocent by the law and are being impermissibly punished without conviction. (Complaint, ¶63, A. 23).

4. Petitioners' right to vote is being infringed in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965 because the laws of Pennsylvania have the effect of denying them the right to vote because of their race. (Complaint, ¶s 59 and 61(d), A. 21-22).

5. Depriving petitioners of their right to vote is neither a necessity of nor inherently related to their incarceration. (Complaint, ¶s59 and 63, A. 21-23).

Prior to the filing of their complaint, petitioners attempted to redress these grievances by requesting that the election officials of the Commonwealth of Pennsylvania (1) permit them to register and vote by proxy exercised in person by their attorneys, or (2) permit petitioners to go to the polls on their own, by guarded transportation, if necessary, or (3) furnish the jails with polling booths, or (4) permit them to register and vote by mail or other absentee means or (5) generally to allow petitioners to register and vote by any means which they deemed advisable. (Complaint, ¶s31-34, 52 and 54, A. 17-18, 20, and 21). However, all of petitioners' requests were refused. (Complaint, ¶s34 and 52, A. 18 and 20).

Accordingly, petitioners are confronted with the situation, as alleged in their complaint, where there are no existing procedures whereby they may register and vote. (Complaint, ¶s50 and 51, A. 20).[4]

On October 6, 1972, after the election officials of the Commonwealth had refused petitioners' numerous requests, petitioners filed their complaint, on behalf of themselves and all others similarly situated, with the United States District Court for the Eastern District of Pennsylvania. Petitioners' action was brought against the Commonwealth of Pennsylvania, J. Shane Creamer, Attorney General, C. Delores Tucker, Secretary of the Commonwealth (all of whom are hereinafter referred to as the "Commonwealth" defendants) and Maurice S. Osser, Frank Patterson, and Louis Menna, City Commissioners (constituting the Board of Elections of the City and County of Philadelphia), Edward Mekel, Deputy Commissioner, Jack Welsh, Voting Registration Supervisor, the Registration Commission of Philadelphia, and Edward Hendricks, Superintendent of Philadelphia County prisons (all of whom are hereinafter referred to as the "Philadelphia" defendants).

Petitioners' complaint seeks to enjoin all defendants from depriving them of their right to register and vote in violation of their constitutional rights and in violation of the Voting Rights Act of 1965 and the Civil Rights Act.

---

[4] Since the majority of states have enacted registration and voting laws similar to those in Pennsylvania, a majority of the 83,000 pretrial detainees in the United States are disenfranchised by the existing laws. See Appendix C to petitioners' Petition for a Writ of Certiorari for a survey of United States law on the right of unconvicted pretrial detainees to register and vote.

In addition to their complaint, petitioners filed a motion for leave to proceed in forma pauperis, a motion for a three-judge court (A. 78), and motions for a temporary restraining order (A. 68) and a preliminary injunction (A. 76).

On October 6, 1971, the day the complaint was filed, the District Court granted petitioners' motion for leave to proceed in forma pauperis and held oral argument on petitioners' motion for a temporary restraining order. During the one-hour argument, the Commonwealth defendants admitted that the statutes challenged by petitioners unconstitutionally denied them the right to vote. The Philadelphia defendants, on the other hand, who claimed that they were not bound by the admission of the Commonwealth defendants, took the position that the Commonwealth's statutes did not unconstitutionally deny petitioners the right to vote.

At the conclusion of the argument, the District Court *sua sponte* dismissed petitioners' complaint on the ground that the Court lacked subject-matter jurisdiction. The District Court held that since the Commonwealth defendants had made the above-mentioned admission there was no case or controversy before the Court within the meaning of Article III of the Constitution. (A. 81, 84-85).

Two days thereafter petitioners appealed this decision to the Court of Appeals for the Third Circuit and the case was set down for oral argument during the week of October 18, 1971.

The panel of the Third Circuit to which the case was assigned notified the parties that it had decided to dispense with oral argument of the matter. On October 26, 1971, the panel, acknowledging that the matter was being hurriedly decided by it, filed a *per curiam* Opinion

affirming the decision of the District Court. The Court affirmed without discussion the District Court's finding on jurisdiction and additionally found that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in light of the decision by this Court in *McDonald v. Board of Elections*, 394 U.S. 802 (1969). Accordingly, the panel stated, there was no need for the District Court to convene a three-judge court. The Court further held that the statutes challenged by petitioners were clearly constitutional. *Goosby v. Osser*, 452 F.2d 39 (3d Cir. 1971). (A. 88, 90-91).

On November 9, 1972, petitioners filed with the Court of Appeals a petition for rehearing *en banc*. On December 17, 1971, this petition was denied *per curiam*, three of the seven judges dissenting including one member of the panel which had affirmed the decision of the District Court. Circuit Judge Arlin Adams filed an opinion dissenting from the Court's denial of rehearing. *Goosby v. Osser*, 452 F.2d at 41. (A. 94). In his dissent, Judge Adams stated that:

(a) petitioners' case was not controlled by *McDonald v. Board of Elections, supra*, but rather presented serious constitutional questions unanswered by *McDonald*, and

(b) the Court of Appeals had exceeded its proper adjudicatory role by deciding that the statutes challenged by the petitioners were constitutional.

On March 10, 1972, petitioners filed with this Court a Petition for a Writ of Certiorari, which was granted on June 26, 1972.

SUMMARY OF ARGUMENT

I. Petitioners' case presents substantial constitutional questions which require the empanelling of a three-judge court.

The Court of Appeals held that petitioners were not entitled to a three-judge court because it found that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in view of *McDonald v. Board of Elections*, 394 U.S. 802 (1969). Petitioners case is, however, distinguishable from *McDonald* and presents several substantial constitutional issues not clearly foreclosed by that decision.

First, unlike the *McDonald* appellants, petitioners are absolutely denied the very right to vote. Petitioners have alleged in their complaint an absolute denial of the franchise because they have attempted to register and vote in various ways, both by absentee means and in person, but all their attempts have been refused by the respondents. (Complaint, ¶s31-34, 52 and 54, A. 17-18, 20, and 21). In the present procedural posture of their case, the allegations of their complaint must be assumed to be true. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933). Indeed, at no time during the proceedings below or in this Court has any respondent denied that petitioners are absolutely denied the right to vote.

Second, the Pennsylvania absentee ballot statute, unlike the Illinois statute in *McDonald*, draws lines on the basis of wealth and race. While the Illinois statute did not expressly deny an absentee ballot to anyone, the Pennsylvania statute denies an absentee ballot to one "confined in a penal institution." 25 Purdon's Statutes

§2602(w)(12) (Supp. 1972). Although this legislative classification is not expressly or designedly discriminatory on the basis of wealth or race, it is grossly discriminatory *in fact*, both on the basis of wealth *and* race, because over 90 percent of the petitioners are "non-white" and indigent. As this Court has recognized in several cases, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956). Further, it should be noted that the *McDonald* appellants did not allege, as petitioners do, that they are being denied the right to vote on the basis of color in violation of the Fifteenth Amendment. This raises a substantial constitutional question not in issue in *McDonald*. See *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960); *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

Since petitioners are absolutely denied the right to vote and since the Pennsylvania statute draws lines on the basis of wealth and race, the Pennsylvania statute, unlike the Illinois statute in *McDonald*, must be tested by the compelling state interest test.

Even if, however, the Pennsylvania statute is not tested by the compelling state interest test, it must nevertheless be declared unconstitutional because of yet a third distinction between this case and *McDonald*. The *McDonald* Court, applying the reasonableness test, upheld the Illinois absentee ballot statute on the ground that it was "remedial" in nature, that is, it extended absentee ballot coverage to some but did not deny coverage to any eligible voter. 394 U.S. at 809-11. The Pennsylvania statute, on the other hand, is not "remedial" in nature since it expressly denies coverage to petitioners. This important statutory distinction raises a substantial constitutional question not foreclosed by *McDonald*.

II. Petitioners' case constitutes a case or controversy under Article III of the Constitution.

The District Court found that there was no adversity of interests between petitioners and all defendants because the Commonwealth defendants admitted that the laws of Pennsylvania unconstitutionally deprived petitioners of their right to vote. However, the Philadelphia defendants made no such admission and have vigorously defended this case on the merits in all courts. Thus, adversity of interest remains between petitioners and the Philadelphia defendants notwithstanding the admission of the Commonwealth defendants. Moreover, this Court has held that the admission of liability by a defendant does not operate to divest a federal court of jurisdiction. *Re Metropolitan Railway Receivership*, 208 U.S. 90 (1908).

The District Court also dismissed the petitioners' complaint because it lacked expertise to frame a remedy. However, even assuming there might be some difficulty in framing a remedy, this is not a sufficient basis for dismissing the complaint. A federal court sitting in equity has broad remedial powers and has the duty to remedy the deprivation of constitutional rights. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

Finally, the District Court dismissed petitioners' case because the defendant Attorney General had not issued a formal Attorney General's Opinion to the Philadelphia defendants. This can have no effect on petitioners' case since, notwithstanding the Attorney General's conduct, petitioners remain unconstitutionally deprived of their right to vote.

ARGUMENT

I.

PETITIONERS' CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS WHICH REQUIRE THE CONVENING OF A THREE-JUDGE COURT SINCE PETITIONERS' COMPLAINT ALLEGES THAT THEY AND OTHER PRETRIAL DETAINEES IN PHILADELPHIA COUNTY ARE ABSOLUTELY DENIED THE RIGHT TO VOTE BY THE COMMONWEALTH OF PENNSYLVANIA

Petitioners moved in the District Court pursuant to 28 U.S.C. § 2281 for the empanelling of a three-judge court. Although the District Court specifically did not rule on this motion and dismissed petitioners' complaint for lack of subject-matter jurisdiction, the Court of Appeals affirmed the District Court's dismissal of the complaint, without discussion of the jurisdictional issue, on the ground that petitioners were not entitled to a three-judge Court. Relying on *Bailey v. Patterson*, 369 U.S. 31 (1962), the Court of Appeals held that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in view of *McDonald v. Board of Elections*, 394 U.S. 802 (1969).[5]

---

[5] The Court of Appeals did not find that petitioners' case failed to satisfy any other requirement for the empanelling of a three-judge Court. Indeed, petitioners' case clearly meets these other requirements since their complaint challenges state statutes of general application and statewide concern, the complaint seeks an injunction against the enforcement of these statutes, and the actions of both state officers and local officers performing state functions are sought to be enjoined.

Moreover, it should also be noted that the Court of Appeals not only decided that petitioners were not entitled to a three-judge Court, but also held that the statutes in question were constitutional. As Judge Adams noted in his dissenting opinion

In *Bailey* and in several other cases, this Court has established that a statute is not challenged upon the ground of unconstitutionality within the meaning of 28 U.S.C. § 2281 where the claim of unconstitutionality is (1) "essentially fictitious" or "legally speaking non-existent," or (2) is "frivolous" because of prior decisions. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *California Water Service Co. v. City of Redding*, 304 U.S. 252, 254 (1938); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

In *Ex Parte Poresky*, 290 U.S. 30, 32 (1933) the Court expressed this rule as follows:

> The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' (citations omitted).

Accordingly, the issue before this Court is whether the *McDonald* decision so clearly forecloses the constitutional questions raised by petitioners' complaint and leaves no room for the inference that these questions can be the subject of controversy. Petitioners contend that the constitutional issues of their case are clearly not foreclosed by *McDonald*.

In *McDonald*, appellants were a class of untried pretrial detainees in Cook County, Illinois, who were already registered to vote and who sought to vote only by absentee ballot. Appellants made a timely application for

---

(A. 94), the Court of Appeals by this decision has exceeded its proper adjudicatory role and usurped the function of a three-judge Court. *Goosby v. Osser*, 452 F.2d at 41.

an absentee ballot to the Cook County Board of Election Commissioners, but the Board denied their application on the ground that appellants did not fall within those groups which the Illinois Election Code specifically permitted to vote by absentee means.[6]

Appellants then filed a complaint alleging that the provisions of the Illinois Election Code denied them equal protection of the law by not including them within the groups allowed to vote by absentee ballot. Appellants claimed that they were denied equal protection because the Illinois Election Code (1) did not provide for an absentee ballot for one "judicially incapacitated," but made it available to one "medically incapacitated" and (2) did not provide for an absentee ballot for appellants, but made it available to pretrial detainees who were residents of Cook County incarcerated outside of Cook County.

The threshold question confronting this Court was "how stringent a standard to use in evaluating the classifications made [by the Illinois' absentee provisions] and whether the distinctions must be justified by a compelling state interest . . . ." 394 U.S. at 806. In resolving this question, the Court recognized that its previous decisions required the application of the more stringent compelling state interest test in either of two situations:

---

[6]The Illinois absentee voting statute, Ill. Rev. Stat., c. 46, §§19-1 to 19-3, made absentee balloting available to four classes of persons: (1) those who were absent from their county of residence for any reason; (2) those who were "physically incapacitated"; (3) those whose observance of a religous holiday prevented attendance at the polls; and (4) those who served as poll watchers in precincts other than their own on election day. 394 U.S. at 803-04.

(1) if the appellants' right to vote were infringed, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); or

(2) if the statutory classifications were drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections, supra; McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Douglas v. California*, 372 U.S. 353 (1963). 394 U.S. at 807.

The Court found, however, that appellants' case did not fall within either of these two situations.

First, with respect to the infringement of appellants' right to vote, the Court said, at page 807-08:

> . . . [t]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots . . . . Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.

Second, with respect to the nature of the classifications drawn by the Illinois statute, the Court said that the "exacting approach" was not necessary since "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race." 394 U.S. at 807.

Additionally, the Court noted, in footnote 7 on page 808, that it would not reach appellants' contentions that they were the recipients of an impermissible consequence of pretrial detention and were being denied their right to vote solely because of their inability to post bail,

contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), "[s]ince there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State . . . . "

Having resolved the threshold question in this manner, the Court tested the Illinois absentee ballot provisions by the usual standards applicable when a fundamental right is not in issue. The Court said that the statutory classifications must be upheld if they bear a reasonable relationship to a legitimate state end. 394 U.S. at 808-09. The Court then found that it was reasonable to treat the appellants differently from the medically handicapped and from those incarcerated outside of Cook County, 394 U.S. at 809-10, and concluded that it was "satisfied . . . that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained." 394 U.S. at 810.

In summary, then, the Court held in *McDonald:*

(1) that it would not apply the compelling state interest test to appellants' challenge to the Illinois absentee ballot statute (a) because appellants' could not show that they were absolutely denied the right to vote but only that they were denied the use of an absentee ballot and (b) because the Illinois absentee ballot laws were not drawn on the basis of race or wealth; and

(2) that the Illinois absentee ballot laws reasonably discriminated against appellants in favor of the medically incapacitated and pretrial detainers incarcerated outside of Cook County.

Petitioners contend for several reasons that their case is factually and legally distinguishable from *McDonald* and presents substantial constitutional questions unanswered by *McDonald.* Indeed, petitioners' case raises some

questions clearly left open by *McDonald* and other questions not in issue in *McDonald*.

First Distinction – Petitioners, unlike the *McDonald* appellants, are absolutely denied the right to vote.

Petitioners' are a class of untried pretrial detainees in Philadelphia County, Pennsylvania, many of whom seek not only to vote but to register to vote. Petitioners sought to register and to vote not only by absentee means, but also by various other means including appearance by proxy, by requesting that the election officials bring polling booths and registration facilities to prisons, by requesting permission to go personally to polling places, by guarded transportation if necessary, and generally by any means which the defendant election officials deemed advisable to utilize. Since both the Commonwealth and Philadelphia defendants refused all of petitioners' attempts to register and to vote, petitioners are absolutely denied the right to vote. (Complaint, ¶s30-34, 47-56, 59, A. 17-18 and 20-21).[7]

---

[7] In the present procedural posture of petitioners' case, the allegations of their complaint must be deemed to be true. *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971); *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 601 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

In *Gomillion*, the lower courts dismissed the plaintiffs' contention that their right to vote was being infringed on the basis of race in violation of Fourteenth and Fifteenth Amendments on the grounds of lack of jurisdiction and failure to state a claim. In ruling on the propriety of the dismissal, this Court said, at page 341:

> At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to

Indeed, at no time during this litigation has any respondent disputed that petitioners are absolutely denied the franchise. Rather, the Philadelphia defendants have vigorously contended in all the proceedings below that, notwithstanding this absolute denial, the laws of Pennsylvania are constitutional.

In view of this total denial of the franchise, the following consequences, specifically recognized by *McDonald*, result:

(1) the classifications drawn by the challanged Pennsylvania statutes must be tested by the compelling state interest test, 394 U.S. at 807-08;

(2) petitioners' claim that they are the recipients of an impermissible consequence of pretrial detention in violation of due process of law must be addressed by the courts, 394 U.S. at 808, footnote 7; and

(3) petitioners' claim that they are being denied the right to vote because they cannot afford bail, contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), must also be addressed by the courts, 394 U.S. at 808, footnote 7.

Since these three consequences flow from the absolute denial of the franchise to petitioners, it is clear for this reason alone that petitioners' case is not foreclosed or rendered frivolous by *McDonald*.

Further, it must be also noted that the substantiality of the constitutional questions raised by this case cannot

---

sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution.

be doubted in view of decisions by this Court subsequent to *McDonald*. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), *Evans v. Cornman*, 398 U.S. 419 (1970), *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court applied the compelling state interest test to statutes challenged by plaintiffs who were absolutely prohibited by their states from voting.

In *Dunn*, the Court held that Tennessee's durational residency requirements, which restricted voting to citizens who lived in the state for one year and in a country for three months, were unconstitutional since they served no compelling state interest and placed an impermissible burden on interstate travel.

Similarly, in *Evans*, the court declared that Maryland could not deny the vote to individuals who resided in federal enclaves within the State.

In *Kramer*, *Cipriano*, and *Kolodziejski* the Court declared that laws which prohibited non-property owners from voting in certain local elections were unconstitutional even though the non-property owners were not denied the right to vote in state and federal elections.

Moreover, in *Bullock v. Carter*, 405 U.S. 134 (1972), the Court recently had the opportunity to address and comment upon a situation where a state tied the right to vote to the affluence of the voter. In *Bullock* the Court was confronted with a claim by a candidate that the filing fee requirements imposed on candidates by Texas law constituted a denial of equal protection of the law. The threshold question for the Court was whether the compelling state interest test or the any rational basis test should be applied to the Texas filing fee system. The

Court found that the more rigid standard of review applied because, *inter alia*, the filing fee requirement had the "liklihood" of denying to some voters the opportunity to vote for a candidate of their choice because of their lack of affluence. 405 U.S. at 144. Tested by this more stringent standard, the Court declared the filing fee unconstitutional.

Petitioners' case is even more compelling than *Bullock* since the impact of the Pennsylvania statutes on petitioners' right to vote is more direct and more clearly related to petitioners' lack of affluence than was the impact of the Texas filing fee system. Petitioners' case is also more compelling than the *Kramer, Kolodziejski* and *Cipriano* cases since the plaintiffs in those cases were only disenfranchised in certain local elections whereas petitioners are disenfranchised in all elections, federal, state and local.

Finally, it should also be noted that there have been several lower court cases since *McDonald*, both state and federal, which have recognized that due process requires that a pretrial detainee not be deprived of any rights except those inherently related to his confinement.[8]

---

[8] *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972) (delay, censorship and reading of incoming mail from attorney); *Anderson v. Nosser*, 438 F.2d 183 (1971), *modified* 456 F.2d 835 (5th Cir. 1972) (inadequate hygienic facilities); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971) (inadequate hygienic facilities); *Jones v. Wittenberg*, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971) *aff'd sub nom., Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (inadequate hygienic and other facilities); *Conklin v. Hancock*, 334 F. Supp. 1119 (D. N.H. 1971) (delay, censorship and reading of incoming and outgoing correspondence with attorney); *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D. N.Y. 1970) (solitary confinement of pretrial detainee unconstitutional); *Palmigiano v. Travisono*, 317 F. Supp. 776 (D. R.I. 1970) (reading

These cases also serve to highlight the substantiality of petitioners' constitutional claims.

Second Distinction – The Pennsylvania absentee voting statute, unlike the Illinois statute challenged in *McDonald*, draws lines on the basis of wealth and race.

The Illinois absentee ballot statute challenged in *McDonald* made absentee ballots available to four classes of persons and did not expressly deny an absentee ballot to any eligible voter. Although the *McDonald* appellants contended that this statute drew lines on the basis of wealth and therefore should be tested by the compelling state interest test, the Court rejected this contention finding that the statute was not so drawn. 394 U.S. at 807.

The Pennsylvania absentee ballot statute, on the other hand, does not merely fail to include petitioners in the class of eligible absentee voters, but rather specifically excludes them. The statute defines "qualified absentee elector" to include twelve classes of persons and then provides: "... That the words 'qualified absentee elector' shall in nowise be construed to include persons confined in penal institution or a mental institution nor shall it in anywise be construed to include a person not qualified as a qualified elector...." 25 Purdon's Statutes §2602(w)(1)-(12).[9]

---

of all outgoing and incoming mail); *Tyler v. Ciccone*, 299 F. Supp. 685 (W.D. Mo. 1969) (censorship and confiscation of manuscript); *Wayne County Jail Inmates v. Wayne County Board*, No. 173217, Wayne County Circuit Court, May 18, 1971 (inadequate hygienic facilities).

[9] For the complete text of this statute, see Appendix to Brief, pp. 9a-11a.

For the following reasons, petitioners contend that this statute does draw lines on the basis of wealth and race and must, as specifically recognized in *McDonald*, be tested by the compelling state interest test.

This Court has long applied the principle that statutes which draw classifications on the basis of wealth or race are "inherently suspect" and require an overriding state interest to be sustained. *McDonald v. Board of Elections*, 394 U.S. 802, 807 (1969); *Hunter v. Erickson*, 393 U.S. 385, 389, 391-92 (1969) (housing ordinance regulating sale and lease of land based on race or religion must be approved by majority of voters at election); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964) (prohibition of interracial cohabitation); *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (right to counsel on appeal); *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregation in public schools); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregation in public schools); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (restrictions on persons of Japanese ancestry); *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring) (misdemeanor to bring indigent into state).

This principle was first applied by the Court to statutes which explicitly classified by race or wealth, *Bolling v. Sharpe, supra, Brown v. Board of Education, supra, Korematsu v. United States, supra*, or which, though not explicitly classifying by race or wealth, were found to be obviously intended to have such an effect. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (redistricting measure a device to disenfranchise black citizens).[10]

---

[10]See *Michelman, The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 20-21 (1969).

This principle has more recently been applied by the Court to statutes which, though not explicitly or purposely designed by legislatures to classify by race or wealth, in fact have that effect. *Bullock v. Carter*, 405 U.S. 134, 142-44 (1972) (filing fee for candidates invidiously discriminates against low income voters); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (indigents who cannot afford to pay fine may not be imprisoned beyond maximum term); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668-70 (1966) (poll tax invidiously discriminates against indigents); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (requiring designation of race of candidate on ballot unconstitutional); *Douglas v. California, supra; Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956) (transcript of criminal proceedings must be given without cost to indigent criminal defendants); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971) (private employers may not adopt arbitrary barriers to employment which operate in fact to discriminate on the basis of race).[11] As this Court

[11]For lower court cases applying this principle, see *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (failure to provide certain municipal services in black neighborhood); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (displacement by urban renewal project based on race); *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967) *aff'd sub nom., Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (disparate educational facilities based on race and lack of affluence); *Serrano v. Priest*, 487 P.2d 1241, 1249-54 (Cal. 1970) (financing of public school system based on property taxes invidiously discriminates against poor); *cf. Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969) (private employer's seniority system discriminates on basis of race); *Johnson v. Pike Corp.*, 332 F. Supp. 490, 493 (C.D. Cal. 1971) (private employer's practice of discharging employees whose wages were garnished discriminates against minorities); *Gregory v. Litton*

said in *Griffin*, and recently reaffirmed in *Williams*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin v. Illinois, supra*, at 17 n. 11; *Williams v. Illinois, supra* at 242.

The Pennsylvania statute attacked by petitioners, although not explicitly or designedly discriminatory on the basis of wealth or race, is grossly discriminatory *in fact* both on the basis of race *and* wealth and must be strictly scrutinized in order to pass constitutional muster. The line drawn by the statute is between those confined in penal institutions and those not confined in penal institutions who qualify for an absentee ballot. As petitioners allege, and can prove, this line has the effect of discriminating against both racial minorities and indigents because over 90 percent of petitioners' class is "non-white" and indigent. The impact of the line drawn by the Pennsylvania statute is thus clearly distinguishable from the line drawn by the statute in *McDonald*. The Illinois statute merely drew a line between four classes of voters eligible to vote by absentee ballot and all others, white and black, poor and affluent, who could not vote by absentee ballot.

Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (private employer's policy of excluding from employment persons who have a number of arrests without convictions discriminates against black job applicants).

See generally *Michelman, supra* note 10, at 21, 24-27; *Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767, 774 (1969); *Goldberg, Equality and Governmental Action*, 39 N.Y.U.L. Rev. 205, 221 (1964); Coons, Clune & Sugarman, *Educational Opportunity, A Workable Constitutional Test for State Financial Structures*, 57 Calif. L. Rev. 305, 358-61 (1969).

Moreover, it should be noted that petitioners' contention that they are denied the right to vote on the basis of race raises constitutional and statutory questions which were not raised in the *McDonald* case and which were not, therefore, before the Court. Unlike the *McDonald* appellants, petitioners allege that their right to vote is being infringed on the basis of race in violation of the Fifteenth Amendment and the Voting Rights Act of 1965. The substantiality of these questions is apparent from decisions of this Court. In *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Court said:

> The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race of color, has been amply expounded by prior decisions. *Guinn v. United States*, 238 U.S. 347; *Myers v. Anderson*, 238 U.S. 368. *The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.* (emphasis added).

See also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

For these additional reasons, therefore, petitioners' case presents constitutional questions not foreclosed by *McDonald*.

Third Distinction – Even if the classifications drawn by the Pennsylvania absentee voting statute are not tested by the compelling state interest test, there are significant differences between *McDonald* and petitioners' case which raise a substantial constititonal question as to whether the Pennsylvania statute invidiously discriminates against petitioners.

As noted above, the Illinois statute in *McDonald* extended the right to vote by absentee ballot to four classes of voters and did not expressly deny an absentee ballot to anyone. The *McDonald* court, in applying the test of reasonableness to this statute, emphasized that the alleged unconstitutional deficiency of the statute was its failure to include appellants in its remedial provisions. The Court said that such "remedial" legislation, *i.e.*, legislation which in the voting context extends the franchise, cannot be considered unconstitutional simply because it fails to go far enough. 394 U.S. at 809-11.[12] The Court further commented that the Illinois legislature should be commended for adding groups to the absentee ballot coverage as those groups came to the legislature's attention and that legislatures are entitled to take reform one step at a time and need not strike at all evils at the same time. 394 U.S. at 809 and 811.

The Pennsylvania statute, on the other hand, because it specifically excludes petitioners from the class of qualified absentee electors cannot be considered a "remedial" statute vis-a-vis petitioners. Unlike the Illinois legislature, the Pennsylvania legislature has not merely

---

[12]For a discussion of this aspect of *McDonald*, see *Note, Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 84-86 (1969).

failed to include petitioners in remedial legislation but rather has affirmatively taken steps to exclude petitioners. Nevertheless, the legislature has extended absentee voting privileges over the years to numerous other classes, including members of the military and the Merchant Marine, members of religious or welfare groups serving the armed forces, civilian employees of the United States, those who are absent from the county of their residence because of their duties, occupation or business, the spouses and dependents of the preceding groups, those who are ill or physically disabled, and bedridden war veterans. 25 Purdon's Statutes § 2602(w)(1)-(12). Until 1963, Pennsylvania had extended absentee voter privileges only to the ill and those absent from their counties on business, while specifically disqualifying those "committed to and confined in a penal institution." In 1963, the statute was amended to extend its remedial provisions to additional classes, as specified above, but the disqualification applicable to petitioners remained intact. In fact, the specific statutory words disqualifying petitioners from absentee ballot coverage were changed slightly by the elimination of the words "committed to." This is a clear indication that the legislature was intentionally reaffirming its policy in this area as to petitioners.

Given this important statutory distinction, even if the compelling state interest test is not applied to the Pennsylvania absentee ballot statute, the statute will not survive the test of reasonableness as applied in *McDonald*. At the very least, it is clear that the Pennsylvania statute is subject to an analysis different than the one by which the *McDonald* Court analyzed the Illinois statute. Accordingly, it must be concluded for this reason also that petitioners' case raises substantial constitutional questions unanswered by *McDonald*.

II.

PETITIONERS' CASE CONSTITUTES A CASE OR CONTROVERSY UNDER ARTICLE III OF THE CONSTITUTION

The District Court, *sua sponte*, dismissed petitioners' complaint for lack of subject matter jurisdiction on the ground that petitioners' case did not constitute a case or controversy with the meaning of Article III of the Constitution. On appeal, the Court of Appeals affirmed the District Court without discussion. *Goosby v. Osser*, 452 F.2d 39 (1971). Consequently, in order for petitioners to obtain the hearing which they seek before a three-judge court, it is necessary for this Court to find not only that petitioners' complaint presents substantial constitutional questions, but also that petitioners' case constitutes a case or controversy within the meaning of Article III of the Constitution.

The District Court appears to have held that petitioners' case failed to constitute a case or controversy for the following three reasons:

1. Since the Commonwealth defendants admitted that the laws in question unconstitutionally deprived petitioners of their right to vote, there is no adversity of interests between petitioners and all defendants.

2. Specific or conclusive relief is not available to petitioners because the District Court lacked expertise to frame a plan of registration or voting.

3. Since the Attorney General of Pennsylvania has not issued a formal Attorney General's Opinion to guide the Philadelphia defendants in this matter, the Philadelphia defendants have no legal standing to defend this law suit and therefore this case is hypothetical or not ripe as to them.

For the following reasons, however, the decision of the District Court is in error.

1. Adversity of interests between parties.

Notwithstanding the admission of the Commonwealth defendants, adversity of interests between petitioners and all defendants remains for two readily apparent reasons.

First, the Philadelphia defendants have made no admission and in fact have vigorously contended in all the proceedings below (1) that they are not bound by any admissions or opinions of the Attorney General and (2) that the laws of Pennsylvania do not unconstitutionally deprive petitioners of their right to vote. Thus, adversity of interests between petitioners and the Philadelphia defendants clearly remains.

Second, even assuming that the Philadelphia defendants were bound by the admission of the Commonwealth defendants, the reasoning and result of the District Court has been expressly rejected in a similar case by this Court. *Re Metropolitan Railway Receivership*, 208 U.S. 90 (1908). In this case the Court held that there was a case or controversy even though the defendant admitted the claims of the plaintiff and consented to the relief requested. The Court reasoned that since demand for relief was made and refused prior to institutions of the suit,

> [t]here was therefore an unsatisfied demand made by complainants and refused by defendant at the time of the filing of the bill. We think that where there is a justiciable claim of some right . . . which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties. . . . It is not necessary that the

> defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. 208 U.S. at 107-108.

The reasoning of *Metropolitan Railway* is equally applicable to petitioners' case. Petitioners made several demands for relief of all defendants prior to commencing suit. These demands were and remain unsatisfied since, notwithstanding the admission, petitioners are still unable to register and vote. Therefore, adversity of legal interest between petitioners and defendants remains until petitioners' demands are satisfied by consent decree or court order.

Moreover, it should be noted that if the rule were otherwise a defendant could have an action against him dismissed merely by admitting liability or fault. The Court would then lose jurisdiction over the case and the plaintiff would be without redress for his injury. *Re Metropolitan Railway Receivership, supra,* at 108. In *Walling v. Helmerich and Payne, Inc.,* 323 U.S. 37 (1944), where the defendant voluntarily discontinued an alleged illegal practice, this Court found that nevertheless there was a case or controversy, noting that "the defendant would presumably be free to resume the use of the illegal plan were not some effective restraint made." *Id.* at 43. Here, despite the Commonwealth defendants' admission, they did not voluntarily cease the illegal practice and continue, for whatever reasons, to deny petitioners the right to register and vote. Petitioners will obtain relief only by a binding court order.

2. Availability of Relief

The District Court held that it lacked expertise to formulate a plan of registration and voting, and, therefore, could not afford petitioners specific relief. An action does not, however, lose its stature as a case or controversy under Article III simply because of possible difficulty in framing relief. A court of equity is endowed with broad remedial powers and any difficulty it may have in formulating a remedy where rights have been infringed will not justify dismissal of a case. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955); *Lewis v. Kugler*, 446 F.2d 1343, 1352 (3d Cir. 1971). As the above-cited cases recognized, federal district courts have broad powers to remedy the deprivation of constitutional rights. Indeed, this Court has said that courts not only have the power, but the duty, to remedy discriminatory practices. *Louisiana v. United States, supra*, at 154. If the District Court felt the need for guidance as to remedy it could have asked for expert testimony, which the petitioners were and are ready to present, or it could have asked the parties to submit proposals to it. Indeed, the prayer for relief in petitioners' complaint (A. 24) sets forth specific steps for implementing voting and registration procedures for petitioners.

Accordingly, even given the District Court's concern for appropriate remedies, dismissal of petitioners' case was not proper. The District Court could clearly grant specific relief of a conclusive nature to petitioners by enjoining defendants from continuing to refuse to allow petitioners to register and vote.

3. Hypothetical Nature of the Case

The District Court found that since the Commonwealth defendants admitted the unconstitutionality of the challenged statutes but did not issue a formal Attorney General's Opinion on the subject to the Philadelphia defendants, the Philadelphia defendants, by resisting petitioners' case, were, in effect, asking the Court to render an advisory opinion before the Attorney General had issued his own formal opinion. It is clear, however, that the absence of an Opinion of the Attorney General neither transforms petitioners' plight into an abstract situation nor fails to make it any less a present, existing deprivation of constitutional rights. The Attorney General of Pennsylvania is not required to issue Opinions and throughout all the proceedings in this case the Philadelphia defendants have steadfastly maintained that they are independent officials not bound by the opinions and admissions of the Attorney General.[13]

---

[13] A month before the institution of this case, the Attorney General issued an Opinion regarding student registration in Pennsylvania. The Philadelphia defendants refused to follow the procedures outlined in that Opinion. When a class action was brought on behalf of the students, the Philadelphia defendants signed a consent decree. A specific provision of that decree recites that the Philadelphia defendants do not admit or recognize by entering into a consent decree that they are bound by the Opinions of the Attorney General. *Fair v. Osser*, Civil Action No. 71-2212, Eastern District of Pennsylvania, Stipulation and Order dated September 27, 1971.

CONCLUSION

For all of the foregoing reasons petitioners respectfully request that the judgment, opinion and order of the Court of Appeals be reversed because (1) the Court of Appeals erroneously held that petitioners' case is wholly insubstantial in view of *McDonald v. Board of Elections*, and (2) the Court of Appeals erroneously affirmed the District Court's dismissal of petitioners' complaint for lack of subject-matter jurisdiction. Petitioners respectfully request that the Court remand the case to the Court of Appeals with instructions to remand to the District Court for the empanelling of a three-judge Court.

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
Attorneys for Petitioners

Of Counsel:
DONALD A. GIANNELLA
GREGORY M. HARVEY

On the Brief:
Allan H. Lawson

DATED: August 28, 1972

APPENDIX TO BRIEF

UNITED STATES CONSTITUTION

Article I, Section 2, Clause 1

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Twenty-Fourth Amendment

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay a poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

UNITED STATES CODE

Title 28, Section 2281

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title.

Title 28, Section 2284(1)

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Title 42, Section 1971(a)(1) and (a)(2)(A)

(a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servititude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall–

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practicies, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote

. . .

Title 42, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

PENNSYLVANIA CONSTITUTION

Article I, Section 5

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Article VII, Section 4

All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided; That secrecy in voting be preserved.

PENNSYLVANIA ELECTION LAWS

First Class City Permanent Registration Act,
25 Purdon's Statutes §623-1 et seq., in relevant part

Section 623-20(a)

(a) Every person claiming the right to be registered as an elector must appear in person before the commission, a commissioner, a clerk or employee of the commission acting as registrar or a registrar at the main office of the commission, or at such other office or place as the commission shall have designated, and answer the questions required to be asked in accordance with this act.

Every person claiming the right to be registered as an elector who is physically disabled so that he cannot appear in person to be registered may request, in writing, that the registration commission send a registrar to the residence of such person for the purpose of registering such person in the same manner as required by law of other persons appearing for registration. The letter

requesting such registration shall be accompanied by a statement of the physician attending such person, stating that such person is physically disabled to the extent that such person is unable to appear at any of the established places for registration. Upon receipt by the registration commission of such a letter duly accompanied by the required physician's statement, the registration commission shall direct one of its registrars to go to the residence of such disabled person and register him or her, as the case may be.

Section 623-20.2(a),(d),(e)

In addition to any other method herein provided, the following persons may also be registered in the manner hereinafter set forth under this section: (1) any person in military service, his spouse and dependents; or (2) any person in the Merchant Marine, his spouse and dependents; or (3) any person in religious and welfare groups officially attached to and serving with the Armed Forces, his spouse and dependents; or (4) any person who is a civilian employee of the United States outside the territorial limits of the several states of the United States and the District of Columbia, whether or not such person is subject to the civil service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, his spouse and dependents.

(a) He may make application to the commission for a registration card. The commission is hereby authorized to consider a request for an absentee ballot from any person enumerated in this section as an application for a registration card and to cause to be forwarded to any such person, together with his absentee ballot and balloting material, a registration card in duplicate to be completed and sworn to or affirmed prior to or concurrently with the time of voting the absentee ballot . . .

(d) Upon written application by any person who may register under the provisions of this section to the registration commission having jurisdiction in the city in which the applicant resided on the date of leaving his home residence, a registration card, in the form herein prescribed, in duplicate, shall be mailed to the applicant at the address given in such application. Such person shall thereupon supply the information required on the registration card, in duplicate, and shall take the affidavit thereto, in duplicate, in the presence of any person authorized to administer oaths, and shall mail the same, in duplicate, to the registration commission from which it was procured.

(e) Registration in the manner prescribed for by persons registering under this section may be made at any time.

Section 623-20.3(a),(d),(e)

Any elector who is unable to appear in person to register because of illness or physical disability may, in addition to any other method herein provided, also be registered in the following manner:

(a) He may make application to the commission for a registration card.

(d) as in section 623-20.2(d), *supra.*

(e) as in section 623-20.2(e), *supra.*

Section 623-21

Every person who shall possess all the qualifications of an elector as provided in the Constitution and laws of this Commonwealth, or who by continued residence in his election district will obtain such qualifications before the

next ensuing general or municipal election, shall be entitled to be registered as herein provided, and no person shall be permitted to vote at any election or primary held in such city unless he shall have been so registered, and no elector so registered shall be required to register again for any election or primary while he continues to reside at the same address, or has removed his residence to another address in the same district and has filed a removal notice as provided by this act, unless his registration is cancelled by the commission by reason of his failure to vote during the certain period as hereinafter provided, or for any other reason under the provisions of this act.

Section 623-38, in part

(a) Any person whose registration affidavit appears in the district register of any election district in the city, and who, upon applying to vote, shall have signed his name to a voter's certificate, in the form hereinafter provided, as a means of identification, and whose signature thereon shall have been compared by the election officers in the presence and view of the watchers, with the signature of the applicant as recorded in the district register and shall have been deemed authentic by said election officers, shall be entitled to vote in such district at any general, municipal or special election, unless it be shown to the satisfaction of the election officers that he has become disqualified by removal from the district since registration, or that he has violated any law of this Commonwealth prohibiting bribery at elections . . .

Pennsylvania Election Code, 25 Purdon's Statutes §2602 (w)(x)(y)(z-1) and (z-3) in part

(w) The words "qualified absentee elector" shall mean:

(1) Any qualified elector who is or who may be in the military service of the United States regardless of whether at the time of voting he is present in the election district of his residence or is within or without this Commonwealth and regardless of whether he is registered or enrolled; or

(2) Any qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the State or county of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; [1] or

(3) Any qualified elector who is or who may be in the service of the Merchant Marine of the United States if at the time of voting he is absent from the State or county of his residence. . . .; or

(4) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is in the service of the Merchant Marine of the United States if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

---

[1] The clause of this subsection commencing with "Provided, however" is repeated in subsections (3) through (8) which follow and will be omitted therefrom.

(5) Any qualified elector who is or who may be in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting he is absent from the State or county of his residence . . . .; or

(6) Any qualified elector who is a spouse or dependent residing with or accompanying a person in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

(7) Any qualified elector who is or who may be a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such elector is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting he is absent from the State or county of his residence . . . .; or

(8) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia whether or not such person is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

(9) Any qualified war veteran elector who is bedridden or hospitalized due to illness or physical disability if he is absent from the Commonwealth or county of his residence and unable to attend his polling place because

of such illness or physical disability regardless of whether he is registered and enrolled; or
As amended 1968, Dec. 11, P.L. __, No. 375, §1.

(10) Any qualified, registered and enrolled elector who expects to be or is absent from the Commonwealth or county of his residence because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or
As amended 1968, Dec. 11, P.L. __, No. 375, §1.

(11) Any qualified, registered and enrolled elector who is unable to attend his polling place because of illness or physical disability; or

(12) Any qualified, registered and enrolled elector who is a spouse or dependent accompanying a person employed in the service of this Commonwealth or in the service of the Federal Government within the territorial limits of the several States of the United States and the District of Columbia in the event the duties, profession or occupation of such person require him to be absent from the Commonwealth or county of his residence:

Provided, however, That the words "qualified absentee elector" shall in nowise be construed to include persons confined in a penal institution or a mental institution nor shall it in anywise be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition set forth in section 102(t) of this act.
As amended 1963, Aug. 13, P.L. 707, §1.

(x) The words "members of the merchant marine of the United States" mean persons (other than persons in military service) employed as officers or members of crews of vessels documented under the laws of the United States or of vessels owned by the United States or of

vessels of foreign flag registry under charter to or control of the United States, and persons (other than persons in military service) enrolled with the United States for employment or for training for employment or maintained by the United States for emergency relief service as officers or members of crews of any such vessels, but does not include persons so employed or enrolled for such employment or for training for employment or maintained for such emergency relief on the Great Lakes or the Inland waterways. As amended 1963, Aug. 13, P.L. 707, §1.

(y) The word "dependent" means any person who is in fact a dependent. Added 1963, Aug. 13, P.L. 707, §2

. . . .

(z-1) The words "in military service" shall mean the uniformed services as defined in section 102 of the Career Compensation Act of 1949 (63 Stat. 804, U.S. Code, Title 37 Par. 231). Added 1963, Aug. 13, P.L. 707, §2

. . . .

(z-3) The words "duties, occupation or business" shall include leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, and also include an elector's spouse who accompanies the elector. Added 1968, Dec. 11, P.L. __, No. 375, §3.

The Permanent Registration Act for Cities of the Second Class, Cities of the Second Class A, and Cities of the Third Class, Boroughs, Towns and Townships, 25 Purdon's Statutes §951-1 et seq., in relevant part

Section 951-18(a)

(a) Every person claiming the right to be registered as an elector must appear in person before the commission, a commissioner, a registrar, or a clerk, at the office of the commission, or at such other place as the commission shall have designated, and answer the questions required to be asked in accordance with this act.

Every person claiming the right to be registered as an elector who is physically disabled so that he cannot appear in person to be registered may request, in writing, that the registration commission send a registrar to the residence of such person for the purpose of registering such person in the same manner as required by law of other persons appearing for registration. The letter requesting such registration shall be accompanied by a statement of the physician attending such person, stating that such person is physically disabled to the extent that such person is unable to appear at any of the established places for registration. Upon receipt by the registration commission of such a letter duly accompanied by the required physician's statement, the registration commission shall direct one of its registrars to go to the residence of such disabled person and register him or her, as the case may be.

Section 951-18.1(a), (d), (e)

In addition to any other method herein provided, the following persons may also be registered in the manner hereinafter set forth under this section: (1) any person in military service, his spouse and dependents; or (2) any person in the Merchant Marine, his spouse and depend-

ents; or (3) any person in religious and welfare groups officially attached to and serving with the armed forces, his spouse and dependents; or (4) any person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such person is subject to the civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, his spouse and dependents.

(a) He may make application to the commission for a registration card. The Commission is hereby authorized to consider a request for an absentee ballot from any person enumerated in this section as an application for a registration card and to cause to be forwarded to any such person, together with his absentee ballot and balloting material, a registration card, in duplicate, to be completed and sworn to or affirmed prior to or concurrently with the time of voting the absentee ballot: Provided, however, That the envelope containing such executed duplicate registration cards shall bear a postmark no later than the day of the primary or election for which the absentee ballot is being voted and shall be received at the office of the commission no later than the date as provided by law for the canvassing of absentee ballots.

(d) Upon written application by any person who may register under the provisions of this section to the registration commission having jurisdiction in the city of the second class, city of the second class A, city of the third class, borough, town or township in which the applicant last resided on the date of leaving his home residence, a registration card, in the form herein prescribed, in duplicate, shall be mailed to the applicant at the address given in such application. Such person shall

thereupon supply the information required on the registration card, in duplicate, and shall take the affidavit thereto in duplicate in the presence of any person authorized to administer oaths, and shall mail the same, in duplicate, to the registration commission from which it was procured.

(e) Registration in the manner prescribed for by persons registering under this section may be made at any time.

Section 951-18.2(a),(d), (e)

Any elector who is unable to appear in person to register because of illness or physical disability may, in addition to any other method herein provided, also be registered in the following manner:

(a) He may make application to the commission for a registration card.

(d) as in section 951-18.1(d), *supra.*

(e) as in section 951-18.1(e), *supra.*

Section 951-19

Every person living in a city of the second class, city of the second class A, city of the third class, borough, town or township who shall possess all the qualifications of an elector as provided in the Constitution and laws of this Commonwealth, or who by continued residence in his election district will have obtained such qualifications before the next ensuing elections, shall be entitled to be registered as herein provided. From and after the first day of June, one thousand nine hundred fifty-five, no person shall be permitted to vote at any election or primary held in any city of the second class, city of the second class A,

city of the third class, borough, town or township unless he shall have been so registered, except by order of a court of common pleas as hereinafter provided; and no elector so registered shall be required to register again for any election or primary while he continues to reside at the same address, unless his registration is cancelled by reason of his failure to vote during a period of two years as hereinafter provided.

Section 951-36(a), in part

(a) Any person whose name is in the district register of any election district in any city of the second class, city of the second class A, city of the third class, borough, twon or township, and who, upon applying to vote, shall have signed his name and address to a voter's certificate, in the form hereinafter provided for, as a means of identification, and whose signature thereon shall have been compared by the election officers in the presence and view of the watchers, with the signature of the applicant as recorded in the district register and shall have been deemed authentic by said election officers, shall be entitled to vote in such district at any general, municipal or special election, unless it be shown to the satisfaction of the election officers that he has become disqualified by removal from the district since registration, or that he has violated any law of this Commonwealth prohibiting bribery at elections.

Pennsylvania Election Code, 25 Purdon's Statutes §3050 (a) and (d)

Section 3050

(a) At every primary and election each elector who desires to vote shall first sign a voter's certificate, and, unless he is a State or Federal employe who has registered under any registration act without declaring his residence by street and number, he shall insert his address therein, and hand the same to the election officer in charge of the district register. Such election officer shall thereupon compare the elector's signature on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to make the affidavit and produce the evidence as provided in subsection (d) of this section. When an elector has been found entitled to vote, the election officer who examined his voter's certificate and compared his signature shall sign his name or initials on the voter's certificate, shall, if the elector's signature is not readily legible, print such elector's name over his signature, and the number of the stub of the ballot issued to him or his number in the order of admission to the voting machines, and at primaries a letter or abbreviation designating the party in whose primary he votes shall also be enetered by one of the election officers or clerks. As each voter is

found to be qualified and votes, the election officer in charge of the district register shall write or stamp the date of the election or primary, the number of the stub of the ballot issued to him or his number in the order of admission to the voting machines, and at primaries a letter or abbreviation designating the party in whose primary he votes, and shall sign his name or initials in the proper space on the registration card of such voter contained in the district register.

As each voter votes, his name in the order of voting shall be recorded in two (2) numbered lists of voters provided for that purpose, with the addition of a note of each voter's party enrollment after his name at primaries.

(d) No person, except a qualified elector who is in actual military or naval service under a requisition of the President of the United States or by the authority of this Commonwealth, and who votes under the provisions of Article XIII of this act, shall be entitled or permitted to vote at any primary or election at any polling place outside the election district in which he resides, nor shall he be permitted to vote in the election district in which he resides, unless he has been personally registered as an elector and his registration card appears in the district register of such election district, except by order of the court of common pleas as provided in this act, and any person, although personally registered as an elector, may be challenged by any qualified elector, election officer, overseer, or watcher at any primary or election as to his identity, as to his continued residence in the election district or as to any alleged violation of the provisions of section 1210 of this act, and if challenged as to identity or residence, he shall produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence

in the election district: Provided, however, That no person shall be entitled to vote as a member of a party at any primary, unless he is registered and enrolled as a member of such party upon the district register, which enrollment shall be conclusive as to his party membership and shall not be subject to challenge on the day of the primary.